(10)

JUL 5 1945
CHARLES ELMORE GROPLEY
CLERK

NO. 199

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

J. W. HALE, Petitioner

v.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT,

AND

BRIEF IN SUPPORT THEREOF.

J. S. PICKETT,
THOMAS P. FITZGERALD,
Of Counsel.

LEONARD L. LOCKARD,
Attorney for Petitioner.

INDEX

	Page
PETITION	1-5
Opinion Below	2
Jurisdiction	2
Statement of Case	2
Questions Presented	4
Reasons for Writ	4
BRIEF	6-16
Opinion Below	6
Jurisdiction	6
Statement of the Case	6
Assignment of Errors	7
Statutes Involved	8
Argument	9

CITATIONS

	Page
CONSTITUTION	
Amendment V	9
Amendment VI	9
STATUTES	
Internal Revenue Code (Title 26 USCA)	8
Section 3253 (53 Stat. 391)	8
Section 3254 (53 Stat. 391)	8
Section 3271 (53 Stat. 394)	8, 11
Section 3278 (53 Stat. 395)	9, 12
CASES	
Armour Packing Company v. United States 209 U. S. 56, 52 L. Ed. 681	14
Jarl v. United States 19 F. (2d) 891	5, 15
Ledbetter v. United States 170 U. S. 606, 42 L. Ed. 1162	4, 13
Lynch v. United States, 10 F. (2d) 947	5, 14, 15
Partson v. United States, 20 F. (2d) 127	5, 15
Turk v. United States 20 F. (2d) 129	5, 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

NO._____

J. W. HALE, Petitioner

v.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

J. W. Hale, defendant in the United States District Court for the Western District of Louisiana, and appellant in the United States Circuit Court of Appeals for the Fifth Circuit, files this his petition and prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit affirming the judgment of conviction of petitioner by the United States

District Court for the Western District of Louisiana, for violations of Section 3253 of the Internal Revenue Code.

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 413) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 11, 1945, (R. 419) and a petition for rehearing (R. 420) was denied on June 7, 1945, (R. 424).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 11 and 13 of the Rules of Criminal Procedure promulgated by this Court May 7, 1934.

STATEMENT OF THE CASE

J. W. Hale, petitioner herein, was indicted by the Grand Jury for the Western District of Louisiana, on October 3, 1944. The indictment contained four counts charging petitioner with possessing untaxed whiskey and with carrying on the business of a retail liquor dealer without paying the special tax as required by law. (R. 1-4).

Counts Two and Three of the indictment charged that on or about June 2 and August 8, 1944, respec-

tively, petitioner had carried on the business of a retail dealer in Sabine Parish, Louisiana, without the payment of the required special tax. (R. 2-3). Neither alleged any additional facts descriptive of the offense charged, its time, place, or other circumstances.

Before trial, petitioner filed a motion to quash the indictment on the grounds that each count thereof was uncertain and indefinite and did not set forth sufficient facts to require petitioner to answer or enable him to properly plead thereto. The motion to quash was overruled by the Court and petitioner reserved a bill of exception. (R. 6).

On the trial of the case over petitioner's timely objection, the Government was permitted to introduce evidence to show an offense on or about July 8, 1944, in connection with Count Three of the indictment, charging an offense on or about August 8, 1944. (R. 73-74).

On October 28, 1944, a verdict was returned finding petitioner guilty on Counts Two and Three of the indictment. (R. 370, 391)

Petitioner was sentenced to serve eighteen months in the penitentiary on Count Two of the indictment. Imposition of sentence on Count Three was suspended and petitioner was placed on probation for a period of five years. (R. 372-373, 391)

On appeal to the Circuit Court of Appeals for the Fifth Circuit the judgment of the trial Court was affirmed on May 11, 1945 (R. 419), and a rehearing was denied on June 7, 1945 (R. 425).

QUESTIONS PRESENTED

1. Whether the counts of the indictment under which petitioner was convicted were sufficient under the requirements of Amendments V and VI of the Constitution of the United States.

2. Whether the question of sufficiency of the indictment was properly raised by the motion to quash filed by petitioner.

3. Whether there was material variance and error in admitting over petitioner's timely objection evidence to show an offense on or about July 8, 1944, in connection with Count Three of the indictment charging an offense on or about August 8, 1944.

REASONS FOR THE WRIT

That the decision of the Circuit Court of Appeals sustaining the action of the trial court in overruling petitioner's motion to quash the indictment returned against him is in conflict with the decision of this Court in the case of *Ledbetter v. United States*, 170 U. S. 606, 42 L. ED. 1162, and with decisions of the Circuit Court of Appeals for the Eighth Circuit in the following cases:

Partson v. United States, 20 F. (2d) 127
Turk v. United States, 20 F. (2d) 129
Jarl v. United States, 19 F. (2d) 891
Lynch v. United States, 10 F. (2d) 947

That petitioner's trial and conviction, under the insufficient indictment herein, was violative of his right under the Fifth and Sixth Amendments to the Constitution of the United States to be fully informed of the accusation against him and to be protected from being twice placed in jeopardy for the same offense.

That the case involves an interpretation of sections of the Internal Revenue Code and a question of general criminal law which should be determined by this Court.

WHEREFORE, petitioner prays that a writ of certiorari issue herein directed to the United States Circuit Court of Appeals for the Fifth Circuit, and that the judgment of said Court be reversed.

LEONARD L. LOCKARD,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

OPINION BELOW.

The opinion of the Circuit Court of Appeals (R. 413) has not yet been reported.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on May 11, 1945, (R. 419) and a petition for rehearing was denied on June 7, 1945. (R. 424) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 11 and 13 of the Rules of Criminal Procedure promulgated by this Court May 7, 1934.

STATEMENT OF THE CASE.

Petitioner was convicted in the District Court for the Western District of Louisiana, under Counts Two and Three of an indictment charging him with carrying on the business of a retail liquor dealer without paying the special tax as required by law. (R. 1-4)

Before trial petitioner filed a motion to quash the indictment on the grounds that each count thereof was uncertain and indefinite and did not set forth sufficient facts to require petitioner to answer, or to enable him to properly plead thereof. The mo-

tion to quash was overruled by the Court and petitioner reserved a bill of exception. (R. 6)

During the trial of the case the Government was permitted to introduce evidence to show an offense on July 8, 1944, in connection with Count Three of the indictment which charged that the offense was committed on or about August 8, 1944. Petitioner's objection to the introduction of this evidence was overruled and a bill of exception was reserved. (R. 73-74)

On October 28, 1944, judgment was rendered. On Count Two of the indictment petitioner was sentenced to serve eighteen months in the penitentiary. On Count Three imposition of sentence was suspended and petitioner was placed on probation for a period of five years. (R. 372-373, 391)

On appeal to the Circuit Court of Appeals for the Fifth Circuit the judgment of the trial Court was affirmed. (R. 419)

ASSIGNMENT OF ERRORS.

I

The Court erred in overruling petitioner's motion to quash the indictment for insufficiency.

II.

The Court erred in admitting over petitioner's timely objection evidence of an offense on July 8, 1944, in connection with Count Three of the indict-

ment which charged that the offense was committed on or about August 8, 1944.

STATUTES INVOLVED

The Internal Revenue Code (Title 26 USCA) provides in part:

"Section 3253. *Penalties and forfeitures for non payment of special tax.*

> Any person who shall carry on the business of a *** retail liquor dealer, ** and willfully fails to pay the special tax as required by law, shall, for every such offense, be fined not less than $100 nor more than $5,000 and be imprisoned for not less than thirty days nor more than two years. **** 53 Stat. 391."

"Section 3254. (c) *Retail dealer in liquors.*

> Except as otherwise provided, (1) every person who sells, or offers for sale, foreign or domestic distilled spirits, wines, or malt liquors in less quantities than five wine-gallons to the same person at the same time, shall be regarded as a retail dealer in liquors: *** (53 Stat. 391)

"Section 3271. *Payment of tax.*

> (b) *Due date.* All special taxes shall become due on the 1st day of July in each year, or on commencing any trade or business on which such tax is imposed. In the former case the tax shall be reckoned for one year, and in the latter case it shall be reckoned proportionately, from the 1st day of the month in which the liability to a special tax commenced, to and including the 30th day of June following." (53 Stat. 394)

"Section 3278. *Liability in case of business in more than one location.*

> The payment of the special tax imposed shall not exempt from an additional special tax the person carrying on a trade or business in any other place than that stated in the collector's register; *****" (53 Stat. 395)

ARGUMENT

Petitioner's motion to quash the indictment was based on the contention that it was uncertain, indefinite and did not set forth sufficient facts to require him to answer or to enable him to properly plead thereto. R.5-6)

> The United States Constitution provides:
>
> "In all criminal prosecutions the accused shall enjoy the right*** to be informed of the nature and cause of the accusation." Amendment VI.
>
> "Nor shall any person be subjected for the same offense to be twice put in jeopardy of life or limb." Amendment V.

Counts Two and Three of the indictment, upon which petitioner was convicted, alleged only that on or about June 2nd and August 8th, 1944, he had carried on the business of a retail liquor dealer in Sabine Parish, Louisiana, without payment of the required special tax. (R. 2-3) Neither count alleged any additional facts descriptive of the offense charged, its time, place, or other circumstances, whereby petitioner could identify the alleged offenses and prepare his defense, or whereby, if he were convicted, the in-

dictment and the judgment would protect him from future prosecutions for the same offenses.

We think this proposition is clearly demonstrated by the question of variance presented by the admission over petitioner's objection of evidence of an offense on or about July 8, 1944, which had not been charged in either count of the indictment.

On the trial of the case in connection with Count Three of the indictment wherein the offense charged was alleged to have been committed on or about August 8, 1944, the prosecution offered evidence to prove that the offense had in fact been committed on July 8, 1944. Petitioner objected to the introduction of this evidence on the ground that it was not admissible under the indictment and he was not prepared to meet it. The Court overruled the objection holding that time was not of the essence of the offense charged, and that evidence of a sale any time prior to the date of the indictment and within the statute of limitations would be admissible. To this ruling, petitioner reserved a bill of exception. (R. 73-74)

Under this ruling of the Court the dates set forth in the indictment gave petitioner no notice of the time at which the prosecution would seek to show him guilty of the offenses charged. Evidence offered in connection with either count of the indictment would be equally admissible in support of the other and proof

of an offense at any time within the statute of limitations and prior to the indictment could convict him of either, or both counts.

Even under the Circuit Court's opinion interpreting the tax statutes involved, there would have been no liability for the license tax in July 1944 for engaging in the business in August 1944 as charged. And who can say that this was the identical crime which the grand Jury had in mind in approving the indictment?

Under Section 3271 of the Internal Revenue Code (53 Stat. 394) tax liability is incurred in the month in which the business is commenced and covers the remaining months of the tax year on a prorata basis. Consequently, a payment of the tax for part of the year, or a judgment of conviction for failing to pay the tax for part of the year, would not bar a subsequent prosecution for carrying on the business without having paid the tax at an earlier date in the tax year.

In the instant case, petitioner was convicted under Count Three of the indictment with an offense on or about August 8, 1944, yet all of the evidence offered related exclusively to transactions on July 8, 1944. Neither the indictment nor the judgment would protect petitioner from now being charged with an offense on July 8, 1944. The same evidence could be

used to convict him again except for the unusual circumstance that the evidence here was transcribed and is available. The same proposition would be true with respect to a future prosecution for offenses on dates prior to June 2, 1944.

The allegation of place was insufficient because under it the prosecution would be permitted to introduce evidence to prove either offense at any place in the Western District of Louisiana, and under Section 3278 of the Internal Revenue Code (53 Stat. 395) an additional tax and penalty could be imposed with respect to each separate location at which the business of retail liquor dealer was carried on without having paid the tax.

The indictment contained nothing from which petitioner, who was presumed to be innocent, could derive knowledge as to when and where within the jurisdiction of the Court, or under what circumstances the prosecution intended to prove either of the alleged offenses.

The rule upon this subject, which has been repeatedly stated, is that a defendant in a criminal case, in view of his presumed innocence, is entitled to know from the statements of the indictment not only what facts the prosecution considers sufficient to make him guilty of the offense charged, with reasonable particularity, so that he may make proper defense thereto,

but also that the indictment shall charge all of the essential facts so specifically that the judgment rendered would be a complete defense to a second prosecution.

In the case of *Ledbetter v. United States*, 170 U. S. 606-614, L. Ed. 1162, 1165, this Court had occasion to consider an indictment similar to that in the present case. The indictment there charged defendant with carrying on the business of a retail liquor dealer on the —— day of April, 1896, in the County of Appanoose, in the Southern District of Iowa. No other facts were given. Defendant was tried and after conviction, attacked the sufficiency of the indictment by a motion in arrest of judgment. The court, after discussing the sufficiency of the indictment, sustained the action of the trial court in overruling the motion in arrest of judgment, but stated:

> "We do not wish to be understood as approving the practice that was pursued in this case, or even as holding that this indictment might not have been open to special demurrer for insufficiency as to the allegations of time and place, but upon motion in arrest of judgment we think it is sufficient."

The Circuit Court's opinion (R. 416) seems to hold that the question of insufficiency must be raised by special demurrer and the defect, if any, could have been cured by an application for a bill of particulars.

While this Court in that part of its opinion in the

Ledbetter case, quoted above, referred to a special demurrer, the Court in the opening sentence of its opinion stated:

> "The defendant did not demur to the indictment, nor move to quash or take advantage of its alleged insufficiency upon the trial, ****"

The title or form of a pleading is not determinative if the question is raised and brought to the attention of the Court. It was presented by petitioner's motion to quash, just as effectively as if by demurrer. In the case of *Lynch v. United States*, 10 F. (2d) 947, the sufficiency of an indictment was attacked by a general motion to quash. On appeal the motion to quash was sustained and the trial Court's judgment was reversed.

If the indictment was insufficient because it did not meet constitutional requirements, a bill of particulars would not have made it good. Moreover, the granting of a bill of particulars is discretionary with the trial Court and petitioner had a constitutional right to be tried, if at all, under a valid and sufficient indictment.

In the case of *Armour Packing Company v. United States*, 209 U. S. 56-83, 52 L. Ed. 681-695, it was said:

> "This court has frequently had occasion to hold that the accused is entitled to know the nature and cause of the accusation against him, and

> that a charge must be sufficiently definite to enable him to make his defense and avail himself of the record of conviction or acquittal for his protection against further prosecutions, and to inform the court of the facts charged, so that it may decide as to their sufficiency in law to support a conviction, if one be had, and the elements of the offense must be set forth in the indictment with reasonable particularity, of time, place, and circumstances. And it is true it is not always sufficient to charge statutory offenses in the language of the statutes, and, where the offense includes generic terms, it is not sufficient that the indictment charge the offense in the same generic terms, but it must states the particulars."

In the case of *Turk v. United States*, 20 Fed. (2d) 129, 130, the Circuit Court of Appeals, Eighth Circuit, reversing a judgment of the trial court, held:

> "The information in this case utterly fails to comply with this rule. It confines the possible proof of the commission of each of the offenses to no time within three years, to no place within the jurisdiction of the court, to no identifying circumstances, and a judgment upon it would not protect the defendant against a second prosecution for the commission of the same offense at any time within the three years and at any place within the jurisdiction of the court."

See also:

> *Partson v. United States*, 20 F. (2d) 127;
> *Jarl v. United States*, 19 F. (2d) 891;
> *Lynch v. United States*, 10 F. (2d) 947.

We believe that the indictment here also failed to comply with the rule and was insufficient to such an

extent that it violated petitioner's constitutional rights and that, therefore, the motion to quash should have been sustained.

Respectfully submitted,

J. S. PICKETT,
THOMAS P. FITZGERALD,
Of Counsel.

LEONARD L. LOCKARD,
Attorney for Petitioner.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	4
Argument	6
Conclusion	11

CITATIONS

Cases:

Berger v. *United States*, 295 U. S. 78	11
Bersio v. *United States*, 124 F. (2d) 310, certiorari denied, 316 U. S. 665	9
Capone v. *United States*, 56 F. (2d) 927, certiorari denied, 286 U. S. 553	10
Cornett v. *United States*, 7 F. (2d) 531	10
Dunbar v. *United States*, 156 U. S. 185	10
Glasser v. *United States*, 315 U. S. 60	9
Hagner v. *United States*, 285 U. S. 427	7
Hopper v. *United States*, 142 F. (2d) 181	8
Jarl v. *United States*, 19 F. (2d) 891	8
Lamar v. *United States*, 241 U. S. 103	7
Ledbetter v. *United States*, 170 U. S. 606	7, 8, 9, 10
Lynch v. *United States*, 10 F. (2d) 947	8
Malinow v. *United States*, 42 F. (2d) 374, certiorari denied, 282 U. S. 875	9, 10
Parison v. *United States*, 20 F. (2d) 127	8
Taran v. *United States*, 88 F. (2d) 54	9
Touhy v. *United States*, 88 F. (2d) 930	8
Turk v. *United States*, 20 F. (2d) 129	8
United States v. *Goldsmith*, 108 F. (2d) 917, certiorari denied, 309 U. S. 678	9
United States v. *Lepowitch*, 318 U. S. 702	7
United States v. *Wernecke*, 138 F. (2d) 561, certiorari denied, 321 U. S. 771	8
Weeks v. *Zerbst*, 85 F. (2d) 906	10

Statutes:

Internal Revenue Code, as amended (26 U. S. C.):	
Sec. 3250	2
Sec. 3253	2, 7
Sec. 3254	3
Sec. 3271	3
Sec. 3273	3
Sec. 3278	4
Rev. Stat. 1025, 48 Stat. 58 (18 U. S. C. 556)	8

661852—47

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 199

J. W. HALE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 413–418) is reported at 149 F. (2d) 401.

JURISDICTION

The judgment of the circuit court of appeals was entered May 11, 1945 (R. 419), and a petition for rehearing (R. 420–423) was denied June 7, 1945 (R. 424). The petition for a writ of certiorari was filed July 5, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII

of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the two counts of the indictment on which petitioner was convicted charge offenses under Section 3253 of the Internal Revenue Code with sufficient particularity.

2. Whether, in respect of the date of the offense charged in count 3, there was a material variance between the allegation of that count and the Government's proof.

STATUTE INVOLVED

The pertinent provisions of the Internal Revenue Code, as amended (26 U. S. C.), are:

> § 3250. *Tax.*—
>
> * * * * *
>
> (b) *Retail dealers in liquors*—(1) *In general.*—Except as provided in paragraph (3) of subsection (e), retail dealers in liquors shall pay a special tax of $27.50.
>
> § 3253. *Penalties and forfeitures for non-payment of special tax.*—Any person who shall carry on the business of a * * * retail liquor dealer, * * * and willfully fails to pay the special tax as required by law, shall, for every such offense, be fined not less than $100 nor more than $5,000 and be imprisoned for not less than thirty days nor more than two years. * * *

§ 3254. *Definitions.*—

* * * * *

(c) *Retail dealer in liquors.*—Except as otherwise provided, (1) every person who sells, or offers for sale, foreign or domestic distilled spirits, wines, or malt liquors in less quantities than five wine-gallons to the same person at the same time, shall be regarded as a retail dealer in liquors: * * *

§ 3271. *Payment of tax.*—(a) *Condition precedent to doing business.*—No person shall be engaged in or carry on any trade or business mentioned in this chapter until he has paid a special tax therefor in the manner provided in this chapter.

(b) *Due date.*—All special taxes shall become due on the 1st day of July in each year, or on commencing any trade or business on which such tax is imposed. In the former case the tax shall be reckoned for one year, and in the latter case it shall be reckoned proportionately, from the 1st day of the month in which the liability to a special tax commenced, to and including the 30th day of June following.

§ 3273. *Stamps.*—

* * * * *

(b) *Posting.*—Every person * * * who is thereby made liable to a special tax, shall place and keep conspicuously in his establishment or place of business all stamps denoting the payment of said special tax.

§ 3278. *Liability in case of business in more than one location.*—The payment of the special tax imposed shall not exempt from an additional special tax the person carrying on a trade or business in any other place than that stated in the collector's register; * * *.

STATEMENT

Petitioner was convicted in the United States District Court for the Western District of Louisiana (R. 370, 374) on counts 2 and 3 of an indictment in four counts (R. 1–4).[1] These counts charged that on June 2 and August 8, 1944, respectively, "in the Parish of Sabine, State of Louisiana, Western District of Louisiana," petitioner "did knowingly, wilfully, feloniously and unlawfully carry on the business of a retail liquor dealer and did wilfully fail to pay the special tax as required by law, in violation of Section 3253 of the Internal Revenue Code" (R. 2–3). Before trial, petitioner moved to quash the indictment on the ground, *inter alia,* that each count was uncertain and indefinite; the motion was overruled (R. 5–6). He was sentenced to imprisonment for

[1] The verdict of the jury (R. 370) is silent as to counts 1 and 4 and the record does not explain what disposition was made of those counts. They charged, respectively, that on August 17, 1944, petitioner possessed nine gallons of non-tax-paid distilled spirits, and concealed such spirits with intent to defraud the United States of the tax thereon (R. 2, 3–4).

eighteen months on count 2, and on count 3 imposition of sentence was suspended and he was placed on probation for five years to begin at the expiration of the imprisonment sentence (R. 373, 374). Upon appeal to the Circuit Court of Appeals for the Fifth Circuit, the conviction was affirmed (R. 419).

The evidence supporting counts 2 and 3 may be summarized as follows:

On June 2, 1944, W. E. Clark, a deputy sheriff of Sabine Parish, Louisiana, went to a Negro dance hall owned by petitioner, on a complaint that whiskey was being sold there (R. 65) in violation of a state law prohibiting the sale of liquor in that parish (R. 206). Inside the hall, Clark met a woman, Bessie Lee Miller, and asked her if he could get some liquor. She indicated that he should go to the front porch and see petitioner, which he did. Clark testified that at first petitioner told him that he did not sell liquor, but that finally petitioner took him inside and directed Mrs. Miller to sell him half of a fifth of Three Feathers whiskey. Clark further testified that Mrs. Miller thereupon handed him a half bottle of whiskey behind a screen about six feet away from petitioner, that she charged him $7.00 for it, and that he then arrested her. (R. 65–68, 97.) Mrs. Miller testified that she worked in the cafe at petitioner's hall (R. 146), and that she made the sale of liquor to Clark for

which he arrested her, as well as several other sales prior thereto (R. 147, 148, 149, 162).

In respect of count 3, P. M. Phillips, the sheriff of Sabine Parish, and two of his deputies, Clark and Glen Phares, testified that on July 8, 1944,[2] they arranged to have two soldiers go to petitioner's hall and offer to buy liquor (R. 72, 74, 173, 174). Accordingly, the soldiers went in and brought out a pint and a half of Schenley Reserve whiskey (R. 75, 175). Phillips and the deputies then accompanied the soldiers back to the hall where the soldiers identified Cephus Bell as the one who had sold them the liquor (R. 175, 199). In an upstairs room of the hall two or three pints of the same brand of whiskey were discovered by the officers (R. 76, 176, 200). Clark further testified that petitioner was present in the hall just before he arrested Bell (R. 89). Bell testified that while working for petitioner he had sold liquor to soldiers at the hall on the day he was arrested by the sheriff, and that on several previous occasions he had sold liquor there to other persons (R. 116, 117, 118, 119).

Petitioner had not paid the tax required by law of retail liquor dealers (R. 229, 230).

ARGUMENT

1. Petitioner contends (Pet. 4–5, 7, 9–16) that counts 2 and 3 are fatally defective for vagueness

[2] The date of the offense alleged in count 3 is August 8, 1944 (R. 3).

and failure to inform him of the offenses charged, and that the trial court therefore erred in overruling his motion to quash. He does not, and indeed could not, claim that these counts are bad for failure to allege any essential element of the crimes, but complains only that they do not allege "any additional facts descriptive of the offense charged, its time, place, or other circumstances, whereby petitioner could identify the alleged offenses and prepare his defense, or whereby, if he were convicted, the indictment and the judgment would protect him from future prosecutions for the same offenses" (Pet. 9–10; see also Pet. 12). This contention merits no further review by this Court.

Each of the counts alleges, substantially in the language of Section 3253 of the Internal Revenue Code, that on a specified date petitioner carried on the business of a retail liquor dealer in Sabine Parish, Louisiana, without having paid the special tax required by law. The essential elements of the offenses are thus set forth with sufficient definiteness and certainty to apprise petitioner of the nature of the accusations against him and to protect him against further prosecution for the same crimes. No more is required. *United States* v. *Lepowitch*, 318 U. S. 702, 704; *Hagner* v. *United States*, 285 U. S. 427, 431–433; *Lamar* v. *United States*, 241 U. S. 103, 116; *Ledbetter* v. *United*

States, 170 U. S. 606;[3] *Hopper* v. *United States,* 142 F. (2d) 181, 184 (C. C. A. 9); *United States* v. *Wernecke,* 138 F. (2d) 561 (C. C. A. 7), cer-

[3] In support of his argument, petitioner relies (Pet. 13) upon the concluding paragraph of the *Ledbetter* opinion in which this Court, after sustaining a conviction under an indictment couched in language almost identical with the language of the present indictment, except that it alleged only the month in which the offense occurred, remarked that it did not wish to be understood as approving the practice followed in that case or even as holding that the indictment might not have been open to special demurrer for insufficiency as to the allegations of time and place (170 U. S. at 614). This observation, especially in view of the other authorities cited above, hardly supports petitioner's argument, in which he makes no showing of prejudice, that his conviction should be overturned because of the failure of the indictment to describe the offenses in greater detail. Cf. 18 U. S. C. 556.

There is likewise no merit in petitioner's assertion (Pet. 4–5) that the decision below is in conflict with *Lynch* v. *United States,* 10 F. (2d) 947 (C. C. A. 8), as well as with *Jarl* v. *United States,* 19 F. (2d) 891, *Partson* v. *United States,* 20 F. (2d) 127, and *Turk* v. *United States,* 20 F. (2d) 129, all of which followed the *Lynch* case in the Eighth Circuit. The indictment in the *Lynch* case alleged that "on or about the 7th day of December, 1922, at Pawhuska, in Osage county, in the Western district of the state of Oklahoma, and within the jurisdiction of this court, H. L. Lynch, * * * did then and there knowingly, willfully, and feloniously have in his possession certain intoxicating liquor, to wit, one (1) pint of whisky, in and upon Indian country, to wit, Osage county, Oklahoma" (10 F. (2d) at 948). The decision that this indictment was bad for indefiniteness in the allegations as to time and place is no longer authoritative in the Eighth Circuit. See *Touhy* v. *United States,* 88 F. (2d) 930, 933 (C. C. A. 8).

tiorari denied, 321 U. S. 771; *Bersio* v. *United States,* 124 F. (2d) 310, 314 (C. C. A. 4), certiorari denied, 316 U. S. 665; *United States* v. *Goldsmith,* 108 F. (2d) 917, 920–921 (C. C. A. 2), certiorari denied, 309 U. S. 678; *Taran* v. *United States,* 88 F. (2d) 54, 56 (C. C. A. 8). While the details of the offenses might have been made more explicit, the failure to do so did not amount to a failure sufficiently to allege the elements of the offense defined in the statute. If petitioner wished further specifications as to the circumstances of the alleged offenses, his remedy was by motion for a bill of particulars. *Glasser* v. *United States,* 315 U. S. 60, 66.

Petitioner's argument (Pet. 12) that the allegation that the offenses were committed in Sabine Parish is not a sufficient identification of the situs of the crimes because of the requirement of Section 3278 of the Internal Revenue Code (*supra,* p. 4) that the special tax shall be paid for each place where a person carries on the business of a retail liquor dealer, is untenable. It is generally accepted that an indictment need state no more than that the offense was committed within the jurisdiction of the district court. *Ledbetter* v. *United States,* 170 U. S. 606, 613; *Malinow* v. *United States,* 42 F. (2d) 374, 375 (C. C. A. 4), certiorari denied, 282 U. S. 875. Furthermore, as petitioner apparently concedes (Pet. 11–12), the record in the present case is available to show

precisely the offenses of which petitioner stands convicted and thus to protect him against any feared future prosecution for the same crimes. *Capone* v. *United States,* 56 F. (2d) 927, 933 (C. C. A. 7), certiorari denied, 286 U. S. 553; *Malinow* v. *United States, supra;* see also *Dunbar* v. *United States,* 156 U. S. 185, 191.

2. For like reasons there is no merit in petitioner's contention (Pet. 10–12) that there was a material variance between the allegation of count 3 that the offense charged therein occurred on August 8, 1944, and the proof of an unlawful sale on July 8, 1944. Although it is true that where time is of the essence it must be alleged and established with precision, the general rule is that a variance between the date alleged and the date proved is not material, and proof of the commission of the offense on any date before the return of the indictment and within the period of the statute of limitations is sufficient. *Ledbetter* v. *United States, supra,* at 612; *Cornett* v. *United States,* 7 F. 2d 531, 532 (C. C. A. 8);[4] *Weeks* v. *Zerbst,* 85 F. (2d) 996, 997 (C. C. A. 10). It is clear, also, that the variance in no way affected the substantial rights of petitioner, in view of the proof as to his presence in the hall at the time of the sale on July 8 and the ensuing

[4] In this case the indictment alleged a sale of liquor on January 5, 1923, whereas the proof showed that it was made on January 5, 1924.

arrest of Bell (see p. 6, *supra*). Cf. *Berger* v. *United States*, 295 U. S. 78, 82.

CONCLUSION

The decision below is correct, the case does not present any question of general importance, and there is no real conflict with decisions of other circuit courts of appeal or of this Court. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

HAROLD JUDSON,
Acting Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
CHARLES J. SMITH,
Attorneys.

AUGUST 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945